



May 04, 2007

Serial Letter: KFM-LET-000266

California Department of Transportation  
SFOBB – E2T1 Project  
333 Burma Road  
Oakland, CA 94607

Attention: Pedro Sanchez

Reference: SAS E2/T1 Foundation Project  
Caltrans Contract No 04-0120E4  
KFM Job No. 364/4347  
State Letter #05.003.01-003053, dated April 19, 2007

Subject: NOPC #05-031707 - Protest to State Response

Dear Pedro:

KFM has received State Letter #3053, dated April 19, 2007, regarding NOPC #5-031707. KFM disagrees with the State's analysis of this potential claim since the requested additional compensation and time associated with NOPC #5 would be a result of State directed changes during the Integrated Shop Drawing ("ISD") process that require the issuance of revised contract drawings and Contract Change Order ("CCO").

**CCO#41 – Incorporation of ISD Resolutions Scope**

State Letter #1485, dated June 30, 2006, directed KFM to proceed with the construction in accordance with the approved ISD revisions and all related RFI responses. The State ensured that payment associated with applying the approved ISD conflict resolutions and RFI responses to the construction would be addressed in Contract Change Order #41.

This letter was written in response to KFM letter #166 (Pier E2 Footing and Pier ISD – Request for Change Order) and KFM letter #172 (Pier T1 Footing ISD – Request for Change Order). In each of these letters, KFM requested that a CCO be issued in accordance with Standard Specification 4-1.03, "Changes", and that revised contract drawings be issued to illustrate the ISD resolutions in the Project Plans. KFM letter #172, dated June 29, 2006 further requested that,

"...KFM has incorporated the revised plan sheets into the ISDs as required in CCOs #17 and 18. However, the physical changes to the work were not included in CCOs #17 and 18 and must now be addressed in the subject change order request. Some of these changes may already be incorporated into the work in progress and KFM expects that full compensation for the changes will be included in the forthcoming change order."

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State Letter #1485, dated June 30, 2006, in response to both KFM letters #166 and 172, did not deny KFM's request for compensation for these particular changes but instead confirmed that all payment for extra work and changes in contract item quantities associated with applying the ISD resolutions would be addressed in CCO #41.

In good faith, KFM has continued to plan and construct the work incorporating all known ISD resolutions as directed in State Letter #1485.

Nine months later, on March 13, 2007, State Letter #2958 was issued as a second response to KFM letter #172, dated June 29, 2006. In it, the State denied KFM's request for compensation for ISD changes as previously depicted in those drawings issued under CCOs #17 and 18 and continues with their assertion that these described changes to the construction were compensated for under CCO #29, albeit this scope of work was not completely known by KFM at the time of CCO #29's execution and was outside of the scope of the base contract and previous CCOs.

It was this event, on March 13, 2007, that initiated the filing of this NOPC #5 in accordance with Standard Specification 9-1.04, "Notice of Potential Claim" and has prompted the referral of this claim to the Disputes Review Board in accordance with Standard Specification 5-1.15, "Disputes Review Board".

### **CCOs #17 and 18 Scope**

State Letters #150 and 180 issued in the fall of 2004 provided 27 draft revised project plans for the construction of Pier T1. KFM was directed to proceed with the work to modify the footing at Pier T1, in accordance with the attached drawings. Specific direction was included to incorporate the described changes into the "conflict set" of the specified ISD submittal. Payment for the work associated with this direction was to be made under pending CCOs #17 and 18.

Throughout the balance of 2004, work continued to incorporate the changes into ISD submittals as directed. However, the physical construction of Pier T1 affected by these changes was not slated to begin until late-2005.

Inherent in the specified ISD process was the fact that the contract drawings would likely have to be revised again after the conflicts were identified and resolved through the ISD and RFI process. And, in fact, 16 of the original 27 draft project plans, noted above, were ultimately revised and reissued along with nine new drawings under CCO #41 on September 13, 2006, approximately two years after the first set of new and revised Project Plans were issued in State Letters #150 and 180.

As history will tell, the contract was temporarily terminated on January 5, 2005. On July 29, 2005, the State revoked this temporary termination. During this period, KFM and the State negotiated and executed CCOs #17 and 18 to compensate KFM for a much reduced scope compared to that originally described in State letters #150 and 180. As written in CCOs #17 and 18, KFM was directed to,

"Pursuant to Section 5-1.0105, "Integrated Shop Drawings", of the Special Provisions, incorporate the details shown on the following revised Project Plan sheets into the initial set of Integrated Shop Drawings (ISDs) that indicate all conflicts."

Both Change Orders go on to state that,

“This agreed sum constitutes full compensation, including all markups, for revising the initial set of ISDs per the Project Plan sheets listed in this Change Order, estimating, RFI preparation, project management and administration, meetings and coordination, checks and reviews, and schedule impacts associated with this Change Order.”

As evidenced by the written language of the final executed CCOs #17 and 18, the agreed to scope and compensation of the change was limited to the incorporation of the details shown into the ISD submittal only.

The executed change orders did not, in fact, address or provide compensation for the incorporation of the details shown into the construction of Pier T1.

State Letter #3053, dated April 19, 2007, in response to KFM’s Supplemental NOPC, contends that the drawings included in CCOs #17 and 18 were made part of the Project Plans not only in so far as they relate to the completion of the ISD submittal but also for use in construction of Pier T1. The State goes on to assert that KFM agreed to this interpretation by signing CCOs #17 and 18.

KFM disagrees with this reasoning entirely, based upon the above discussion. Hence, it has been and continues to be KFM’s position that the drawings associated with CCOs #17 and 18 have only ever been incorporated into the contract as they relate to the ISD work described in Special Provision Section 5-1.0105, “Integrated Shop Drawings”. They have not, as of this date, been incorporated into the contract for construction purposes.

#### **CCO#29 – Termination and Restart Change Order Scope**

Although, the State agrees that KFM is entitled to compensation for the effort to incorporate details changes shown in CCOs #17 and 18 into the construction of Pier T1 and that KFM was not paid for this effort under CCOs #17 or 18, it is the State’s claim that CCO #29 paid for any and all known issues at the time this CCO was signed by KFM on December 2, 2005. This is a much broader scope than is written into the language of CCO #29 as signed by KFM.

As written in executed CCO #29, compensation was provided only:

“...to complete the work as described in the base contract, previous CCOs and this CCO.”

“It is the intent of the parties that the compensation provided in this CCO, together with all other CCOs issued prior to the date of acceptance of this CCO and the base contract, will resolve all issues related to restarting the contract and establish a new contract price for the completion of the contract, except as listed in Section 4.0 of this CCO.”

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Therefore, the compensation provided was limited to those items associated with restarting the contract as described in the base contract and previously executed CCOs.

Other than the exact scope provided in previously issued CCOs, no changes to the original contract scope were included in CCO #29. Additionally, no new or revised Project Plans were included in the scope of CCO #29. KFM would have expected that scope changes to cover any previously known issues, beyond those related to restarting the base contract, previous CCOs and CCO #29, would have been described in the scope language and/or new and revised Project Plans as necessary.

At the time CCO #29 was signed on December 2, 2005 there remained many previously known issues outside the scope of the base contract, previous CCOs and CCO #29. The following lists many of these issues and their respective administrative status:

- 1) UT of the PJP Welds – settled in CCO#31s0 and S1 on 3/28/06 and 10/12/06
- 2) Weld Codes Changes – settled in CCO#15 on 5/11/06
- 3) Isolation Material Spec Change – settled in CCO#30 on 5/12/06
- 4) T1 Bubble Curtain Change Order – settled in CCO#32 on 5/12/06
- 5) Centralizer/Seal Elimination at E2 Footing – pending CCO#14
- 6) T1 Dowel Material Spec Change – pending CCO#51
- 7) Completion of ISD Process – currently being addressed in NOPC #4

KFM views NOPC #5 in the same manner as these other previously known issues that are outside of the base contract and previous CCOs and has acted accordingly. Once changes resulting from ISD were completely described and direction from the State had been provided to incorporate the changes into the work in State Letter #1485, KFM proceeded with this changed work. KFM properly requested additional compensation for these changes in a future Contract Change Order, namely CCO #41.

### In Summary...

KFM requested the issuance of a Contract Change Order to cover the cost of incorporating ISD resolutions into the construction of Pier T1 and Pier E2 in June 2006. State Letter #1485, dated June 30, 2006, ensured that compensation for the same would be forthcoming in Contract Change Order #41. As directed and in good faith, KFM proceeded with the construction accordingly and has continued since.

New and revised Project Plans issued under CCOs #17 and 18 were incorporated into the contract only as they related to the ISD effort. Agreed to compensation covered this scope of work and the accounting of this amount agrees with this scope.

CCO #29 compensated KFM only for work associated with terminating and restarting the original base contract and previous CCOs. Agreed to compensation covered this scope of work only and the accounting of this amount agrees with this scope.

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State Letter #2958, issued nine months later, denied a large portion of this compensation request. This untimely response came long after KFM expended the effort to plan and incorporate the changes into the construction itself.

Draft CCO#41 was recently issued on April 16, 2007, a full 10 months after the direction to incorporate the changes was given. This draft CCO#41 continues to misrepresent the full scope of changes resulting from the ISD effort and, as such, is unacceptable to KFM.

Again, KFM disagrees with the State's analysis of this potential claim and has referred this matter to the Disputes Review Board for consideration.

Sincerely,

**KIEWIT/FCI/MANSON, a JV**

A handwritten signature in dark ink, appearing to read 'LZink', with a small 'Lee' written below it.

Lee Zink  
Project Director

cc: file